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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

SHERYL ELAINE THOMAS, Plaintiff and Respondent, v. SETERUS, INC. et al., Defendants and Appellants.	A155170 (Alameda County Super. Ct. No. HG14740435)

Defendants Seterus, Inc. and Federal National Mortgage Association, Inc. appeal from the order denying their post-trial motion for attorney fees. The history of the underlying litigation, and the trial court's reasoning in denying the motion, are set forth in the order, which (with deletion of record citations) reads as follows:

"Defendants Seterus, Inc. ('Seterus') and Federal National Mortgage Association, Inc. ('Fannie Mae') (collectively, 'Defendants') Motion for Attorney's Fees is DENIED.

"Defendants seek an award of $334,557.50 against Plaintiff Sheryl E. Thomas ('Plaintiff') pursuant to Civil Code section 1717, Code of Civil Procedure sections 1021, 1032, and 1033.5, California Rules of Court, Rule 3.1702, and because they are allegedly prevailing parties and the contracts purportedly at issue provide for reasonable attorney's fees.

"Here, Plaintiff obtained a promissory note ('Note') to obtain a loan to purchase a condominium. The loan was secured by a first-priority Deed of Trust ('DOT'), which was subsequently recorded against the Property. Plaintiff defaulted on the loan, but completed a trial period plan and was offered a loan modification. However, Plaintiff

failed to timely accept the loan modification, so the Property was sold at a foreclosure sale.

"Plaintiff then brought this lawsuit against Defendants challenging the foreclosure process and the sale of the Property. Plaintiff then filed a First Amended Complaint alleging wrongful foreclosure, breach of contract, and to set aside [the] trustee's sale. Following completion of discovery, Defendants filed a motion for summary judgment/summary adjudication, which the Court granted in part and denied in part on May 4, 2016. The matter proceeded to trial on August 2, 2016. After trial commenced, and without Defendants' consent, Plaintiff dismissed this action without prejudice and filed a new complaint against Defendants.

"Following a lengthy law and motion process, the Court set aside Plaintiff's dismissal without prejudice and entered a dismissal with prejudice. However, that dismissal was then set aside and the case reinstated, setting a new trial date for June 27, 2017. On June 27, 2017, Defendants moved for judgment on the pleadings, and the Court dismissed the jury panel, continued the trial date and ultimately found that Plaintiff's claim for dual tracking[1] survived Defendants' challenge. On March 26, 2018, the parties proceeded with the bench portion of the bifurcated trial on Plaintiff's sole cause of action for dual tracking and the Court took the matter under submission. On May 29, 2018, the Court ruled that Plaintiff lacked standing. Judgment was entered in favor of Defendants on June 7, 2018.

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[1] " 'Dual tracking refers to a common bank tactic. When a borrower in default seeks a loan modification, the institution often continues to pursue foreclosure at the same time.' [Citations.] The result is that the borrower does not know where he or she stands, and by the time foreclosure becomes the lender's clear choice, it is too late for the borrower to find options to avoid it. 'Mortgage lenders call it "dual tracking," but for homeowners struggling to avoid foreclosure, it might go by another name: the double-cross.' " (*Jolley v. Chase Home Finance, LLC* (2013) 213 Cal.App.4th 872, 904.) "[L]egislation commonly known as the Homeowner Bill of Rights . . . included a prohibition against 'dual tracking' (a process in which a financial institution pursues foreclosure while a borrower in default simultaneously seeks a loan modification) . . . ." (*Hardie v. Nationstar Mortgage, LLC* (2019) 32 Cal.App.5th 714, 721.)

" 'In any action on a contract, where the contract specifically provides that attorney's fees and costs, which are incurred to enforce that contract, shall be awarded either to one of the parties or to the prevailing party, then the party who is determined to be the party prevailing on the contract, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney's fees in addition to other costs.' (. . . Civ. Code, § 1717(a).)

"Defendant asserts that this action involved two contracts that provide for attorney's fees, the Note and the [DOT]. The Note states that 'the Note Holder will have the right to be paid back by [Plaintiff] for all of its costs and expenses in enforcing this Note . . . includ[ing], for example, reasonable attorney's fees.' The [DOT] states 'Lender may charge Borrower fees for services performed in connection with Borrower's default, for purposes of protecting Lender's interest in the Property and rights under this Security Instrument, including, but not limited to, attorneys' fees.' The [DOT] further states that 'Lender shall be entitled to collect all expenses incurred in pursing the remedies provided . . . including, but not limited to, reasonable attorneys' fees.'

"The Court finds that Section 1717 does not apply to the claims in this case, because this is not an action on a contract. Defendants contend that by defending themselves against Plaintiff's allegations, Defendants were not only enforcing Plaintiff's default on the Loan and the validity of the foreclosure sale, but also were protecting their rights and interests under the Note and the [DOT]. Contrary to Defendants' assertions, defending against the alleged dual tracking claim asserted by Plaintiff has nothing to do with enforcing the terms of the Note, and certainly was not a service provided to Plaintiff due to Plaintiff's default under the [DOT]. Rather, defending the claim concerned negating allegations that Defendant purportedly mishandled the foreclosure and loan modification processes. Therefore, Defendant is not entitled to fees under Section 1717.

"Furthermore, the Court finds that attorney's fees under Section 1717 should not be awarded in cases involving claims under the California Homeowners Bill of Rights ('HBOR'). Indeed, the Legislature provided only for attorney's fees to borrowers for HBOR claims. (. . . Civ. Code, § 2924.12(h) ['A court may award a prevailing borrower

reasonable attorney's fees and costs in an action brought pursuant to this section.'].) As Plaintiff asserts, HBOR's underlying policy is to protect homeowners from foreclosure, and homeowners could not effectively enforce their rights if they fear liability for their lender's attorney's fees. Thus, the Court finds that awarding fees under Section 1717 would undermine the policy behind HBOR.

"Defendant argues that Section 1717 should apply to this HBOR claim, citing to dicta [in] *Weber v. Langholz* (1995) 39 Cal.App.4th 1578. In *Weber*, HBOR was not at issue, but rather the Truth in Lending Act ('TILA'). (*Id*.) There, the trial court granted summary judgment for defendants, holding that the TILA did not apply to the transaction at issue. (*Id*.) Thus, the appellate court explained that 'the award to defendants here is not under [TILA] but on a different basis, plaintiff's contractual agreement to pay defendants' attorney fees.' (*Id*. at 1585.) In *Weber*, '[t]he promissory note and the trust deed signed by plaintiff both provide that plaintiff shall indemnify, hold harmless, and reimburse defendants for all expenses including court costs and attorney fees incurred in connection with the note, and in connection with any action or suit arising out of the note, wherein final judgment is entered in favor of defendants, for all costs including attorney fees, which shall be deemed costs of the judgment.' Thus, the court found that '[b]y the terms of plaintiff's own agreement, the court properly awarded contractual attorney fees to defendants under Civil Code section 1717.' (*Id*.) The remaining discussion about federal preemption of a state statute is merely dicta and inapplicable to this case. The Court also notes that the language in the note in *Weber* allowed for attorney's fees 'in connection with any action or suit arising out of the note,' whereas the language in the Note here only provides fees for enforcing the Note.

"The appellate court decided to address the *Weber* plaintiff's secondary argument that 'to avoid attorney fees under Civil Code section 1717 would frustrate the protection for the consumer in the federal [truth in lending] statute,' and essentially Civil Code section 1717 was preempted by the federal statute. (*Weber*, 39 Cal.App.4th at 1585.) The appellate court found no preemption, holding that '[a] congressional intent to preempt such a state law is not to be presumed by mere implication but must clearly

appear.' (*Id.* at 1586.) However, this dicta concerning a federal statute is not binding on this Court. The Court finds nothing in *Weber* that would support awarding attorney's fees in this HBOR case."

Plaintiff Thomas, as respondent to this appeal, decided not to file a brief though she received due notice pursuant to rule 8.220(a)(2) of the California Rules of Court. That decision does not result in an automatic reversal, nor does it relieve defendants of their affirmative burden to demonstrate reversible error. (E.g., *In re Bryce C.* (1995) 12 Cal.4th 226, 232-233; *Miles v. Speidel* (1989) 211 Cal.App.3d 879, 881.) In these circumstances, "we 'decide the appeal on the record, the opening brief, and any oral argument by the appellant' (Cal. Rules of Court, rule 8.220(a)(2)), examining the record and reversing only if prejudicial error exists." (*Nakamura v. Parker* (2007) 156 Cal.App.4th 327, 333–334.) Moreover, plaintiff and defendants elected not to have oral argument.

The sole point raised on defendants' appeal is that the trial court erred in determining they were not entitled to a fee award because this was not an "action on a contract" within the meaning of Civil Code section 1717. Because this implicates whether defendants satisfied one of the criteria for such an award, it is an issue of law that receives our de novo review. (E.g., *Carver v. Chevron U.S.A., Inc.* (2002) 97 Cal.App.4th 132, 142; *Sessions Payroll Management, Inc. v. Noble Construction Co.* (2000) 84 Cal.App.4th 671, 677.)

"The term 'on a contract' in section 1717 'does not mean only traditional breach of contract causes of action. Rather, "California courts 'liberally construe "on a contract" to extend to any action "[a]s long as an action 'involves' a contract and one of the parties would be entitled to recover attorney fees under the contract if that party prevails in its lawsuit . . . ." ' " ' " (*In re Tobacco Cases I* (2011) 193 Cal.App.4th 1591, 1601.) " 'In determining whether an action is "on the contract" under section 1717, the proper focus is not on the nature of the remedy, but on the basis of the action.' " (*Id.* at p. 1602; accord, e.g., *Douglas E. Barnhart, Inc. v. CMC Fabricators, Inc.* (2012) 211 Cal.App.4th 230, 241; *Kachlon v. Markowitz* (2008) 168 Cal.App.4th 316, 347.)

" 'It is difficult to draw definitively from case law any general rule regarding what actions and causes of action will be deemed to be "on a contract" for purposes of [Civil Code section] 1717.' [Citation.] Among the relevant factors are 'the pleaded theories of recovery, the theories asserted and the evidence produced at trial, if any, and also any additional evidence submitted on the motion in order to identify the legal basis of the prevailing party"s recovery. [Citations.]' " (*Hyduke's Valley Motors v. Lobel Financial Corp*. (2010) 189 Cal.App.4th 430, 435.) How a cause of action was labelled is not dispositive; we look to the gravamen of the plaintiff's action. (See *id*. at p. 436.)

Here, defendants produced no reporter's transcripts for inclusion in the record on appeal, so we cannot examine the evidence produced at trial. However, there is additional evidence produced in connection with defendants' fee motion that is most significant. We are speaking about the exhibits attached to counsel's declaration in support of the motion, specifically Exhibits 4 and 5, which are plaintiff's initial and first amended complaint. (Recall that plaintiff's subsequent effort to file a new complaint was unsuccessful.[2])

Plaintiff's original complaint had four causes of action, for (1) "Wrongful Foreclosure," (2) "Breach of Contract," (3) "To Set Aside Trustee's Sale," and (4) "Quiet Title." Plaintiff alleged that the foreclosure "violated the recently enacted California Homeowners' Bill of Rights," specifically Civil Code sections 2924.18, 2923.5, 2923.55, 2923.6 and 2924f**.** This was the basis for the first and third causes of action.

On the other hand, the cause of action for breach of contract is clearly based upon the breach of "a [2007] mortgage agreement, wherein [Bank of America] agreed to loan Plaintiff the sum of $417,000.00 in exchange for a promissory note secured by a deed of trust." With respect to each and all of the causes of action, plaintiff prayed for "attorneys' fees and costs, pursuant to California Civil Code, § 2924.12(i)."[3]

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[2] Which is why we disregard defendant's reliance on allegations of that rejected pleading.

[3] Civil Code section 2924.12, subdivision (i) has since been recodified at section 2924.12, subdivision (h), and is substantially the same. It states "A court may award a

Plaintiff's first amended complaint is considerably more detailed, and has causes of action for wrongful foreclosure, setting aside the trustee's sale, and quiet title alleged against a new party. Her cause of action for breach of contract, which is also considerably more developed, makes it clear that the instrument alleged to be breached is "The Modification Agreement . . . signed by Seterus, under the actual and apparent authority of FNMA," which "modifie[d] the Note and First Deed of Trust," and which "provided for payment terms and permanent modification after the receipt of three trial payments which were modified from the original Note and First Deed of Trust Due to the enactment of the Homeowners' Bill of Rights." The Modification Agreement "altered the defendants' ability to exercise a right to foreclose as long as Plaintiff made the new payments as agreed." Defendants' "breaches of the Note and the Modification Agreement were in violation of the Civil Code and [the] Homeowners' Bill of Rights." Again, every cause of action included a prayer for "attorneys' fees and costs, pursuant to Civil Code, § 2924.12(i)."

It is also useful to look at defendant's responsive pleading, their answer to plaintiff's first amended complaint.[4] Although much of the charging allegations are denied because defendants "lack sufficient information or belief to answer," defendants state at the outset the position that would ultimately defeat plaintiff: "Defendants deny that Plaintiff is a 'borrower' within the meaning of Civil Code section 2920.5 and that she has standing to sue pursuant to California Homeowner Bill of Rights." Defendants

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prevailing borrower reasonable attorney's fees and costs in an action brought pursuant to this section. A borrower shall be deemed to have prevailed for purposes of this subdivision if the borrower obtained injunctive relief or was awarded damages pursuant to this section." The trial court's written order, which we quote from above, refers to section 2924.12, subdivision (h).

[4] Helpful, but insufficient by itself. (See *Mountain Air Enterprises, LLC v. Sundowner Towers, LLC* (2017) 3 Cal.5th 744, 753 ["while an affirmative defense is a 'real *part of* any action' [citation], it does not, in and of itself, constitute an 'action' for purposes of recovering attorney fees"], 756 ["the assertion of an affirmative defense is *not* . . . an 'action [on a contract]' . . . ."].)

prayed for judgment to include "reasonable attorney's fees and costs," but without identifying the basis of this claim.

Lastly, in the record on their appeal, defendants included three of plaintiff's trial briefs, but none of their own. Plaintiff's trial briefs corroborate and reinforce the conclusion of her pleadings, namely, that hers was a statutory claim, founded completely on the HBOR.

It is clear from even this cursory review of the limited record before us, that plaintiff was at all times basing her claims for relief on the HBOR. The entirety of her prayers for attorney fees were based upon a provision in that statutory scheme. She never invoked the attorney fee provisions of either the promissory note or the deed of trust. It is true that those two instruments are referenced in the amended complaint. There is even, as quoted above, an allegation about defendant's breaching the promissory note. However, this fleeting formulation cannot establish that defendants' purported violations of the original loan instruments constituted the gravamen of her claim.

Those purported violations took a specific form, dual tracking, that was sufficiently wide-spread and pernicious that it received legislative response in the HBOR. Defendants' alleged "breaches" were not departures from obligations spelled out in the contract, but violations of duties superimposed by that statute. Plaintiff did not allege or prove that the foreclosure violated the terms of the deed of trust, as was the case in *Kachlon v. Markowitz, supra*, 168 Cal.App.4th 316, 348.

This is not to say that the promissory note and deed of trust were completely irrelevant. They were, so to speak, present at the creation of the relationship between plaintiff and the original lender. New parties had appeared, for example, the homeowners' association which foreclosed on its interest, and the purchaser of the property at the trustee's sale. That sale, at least in theory, extinguished the interests represented by the promissory note and the deed of trust, thereby pushing them further away from the controversy between plaintiff and defendants. Although the matter is not free from all doubt, our independent review leads us to agree with the trial court's

conclusion that plaintiff's litigation should not be characterized as one "on a contract" with defendants.

Defendants cite two unpublished district court opinions for the proposition that "courts have held that prevailing defendants are entitled to contractual attorney's fees even where a borrower brings claims solely under HBOR." This quote is from *Miller v. Lehman Bros. Holdings, Inc*. (N.D.Cal. 2018) 2018 WL 1210557 at page *5, which merely cites *Mitchell v. Wells Fargo Bank, N.A.* (N.D.Cal. 2014) 2014 WL 1320295, at pages *1, 3, a case where plaintiff conceded that defendant Wells Fargo was entitled to reasonable attorney fees but disputed the amount. *Miller* also cites to *Nguyen v. Wells Fargo Bank, N.A.* (N.D.Cal. 2011) 2011 WL 9322, which is the only one to discuss the issue of whether the plaintiff's claims were "on a contract" for purposes of a contractual attorney fee provision. However, the plaintiff there conceded that certain of his claims were "on the contract," but disputed that the provision covered his tort causes of action. (*Id*. at p. *3.) There was no mention of the HBOR. The Magistrate Judge in *Miller* also cited *Ng v. U.S. Bank, N.A.* (N.D.Cal. 2016) 2016 WL 6995884, and *Joseph v. Wachovia Mortgage Corp*. (N.D.Cal. 2012) 2012 WL 714968, neither of which concerned HBOR. In these circumstances, we do not consider theses cases persuasive or controlling.

The order is affirmed.

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Miller, J.

We concur:

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Kline, P.J.

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Richman, J.

A155170, *Thomas v. Seterus, Inc.*